

“Oh, Snap! The State of E-Discovery as Social Media Goes Mobile via Snapchat, WhatsApp and Other Messaging Apps

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With the series of decisions in *Zubulake v. UBS Warburg*¹⁻⁴ and the revisions to the Federal Rules of Civil Procedure⁵, a new field within legal practice appeared, the law regarding electronic discovery (e-discovery). Although the phase of litigation known as discovery has existed for many years, with opposing parties and their lawyers making requests and exchanging documents that are relevant to a case, e-discovery transformed this process from the paper-based, pre-Internet world of discovery to a whole series of rules and decisions related to how to identify, collect, preserve, analyze, review, produce and present electronically-stored information (ESI). Not only is this evidence in digital form, but it also exists a wide range of media and formats, from word processing and spreadsheet files to photographs, blog postings, videos, emails and websites. More recently, debates and court decisions have focused on electronically-stored information that is posted on social media sites such as Facebook as well as more informal and transient communications involving text messages and new vendor services for mobile devices, such as WhatsApp and Snapchat. As the researchers will demonstrate through current cases, each new technology that generates electronically-stored information is an opportunity to trace its path through the phases of the e-discovery process, to note the legal, technological, logistical and ethical issues at each phase and to consider any special challenges that lawyers and their support teams might face. This research is particularly timely, given that the Federal Rules of Civil Procedure are being significantly revised again, based on a May 2010 conference on civil litigation at Duke University and more than 2,300 comments from interested practitioners and academics since then.⁶ Among the revised rules that will become effective on December 1, 2015, if approved by the U.S. Supreme Court and Congress, are several that directly impact electronically-stored information, including Rules 16, 26, 34 and 37, with the goal of making the e-discovery process more efficient and less burdensome and costly.

1. *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003).
2. *Zubulake v. UBS Warburg*, 216 F.R.D. 280 (S.D.N.Y. 2003).
3. *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003).
4. *Zubulake v. UBS Warburg*, 229 F.R.D. 422 (S.D.N.Y. 2004).
5. Federal Rules of Civil Procedure, Legal Information Institute, Cornell University Law School, As Amended to December 1, 2014, <https://www.law.cornell.edu/rules/frcp>, (last visited 3/9/15).
6. Jordan D. Maglich, *Major Changes Coming to the Rules of Civil Procedure*. 62 The Fed. Law. 37-45 (March 2015).